

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MY LEFT FOOT CHILDREN'S THERAPY,
LLC, JON GOTTLIEB, ANN MARIE
GOTTLIEB,

Plaintiffs,

v.

CERTAIN UNDERWRITER'S AT LLOYD'S
LONDON SUBSCRIBING TO POLICY NO.
HAH15-0632,

Defendant.

Case No. 2:15-cv-01746-MMD-GWF

ORDER

(Defendant's Motion for Summary
Judgment – ECF No. 26;
Plaintiff's Motion for Partial Summary
Judgment – ECF No. 29)

I. SUMMARY

This dispute relates to coverage for a qui tam action under a professional liability insurance policy and its relevant endorsements. Defendant Certain Underwriter's at Lloyd's London Subscribing to Policy No. HAH15-0632 ("Underwriters" or "Defendant") has filed a Motion for Summary Judgment ("Defendant's Motion"). (ECF No. 26.) Plaintiffs My Left Foot Children's Therapy, LLC's ("My Left Foot") and Jon and Ann Marie Gottlieb (collectively "Plaintiffs") have filed a Motion for Partial Summary Judgment ("Plaintiffs' Motion"). (ECF No. 29.) The Court has reviewed the parties' respective responses (ECF Nos. 37, 38) and replies (ECF Nos. 39, 40). The Court has also considered the arguments presented at the September 13, 2016, hearing on the parties'

1 Motions. For the reasons discussed below, Defendant's Motion (ECF No. 26) is denied
2 in part and granted in part and Plaintiffs' Motion (ECF No. 29) is denied.

3 **II. BACKGROUND**

4 **A. The Insurance Policy**

5 Plaintiffs maintained a Professional Liability Insurance Policy ("Policy") with
6 Underwriters for the coverage period of April 15, 2015, through April 15, 2016. (ECF No.
7 1 at 2.) The Policy includes a Retroactive Date of Coverage of April 15, 2014. (ECF No.
8 30-9 at 5.) The Policy is a "claims made" policy, meaning that the Policy provides
9 professional liability coverage to Plaintiffs for covered claims made and reported to
10 Underwriters during the policy period. (ECF No. 26 at 8.) Section I.B. of the Policy
11 provides that Underwriters has the duty to defend Plaintiffs against any "Claim" or "Suit"
12 brought against them arising from a professional liability act covered by the Policy and
13 must do so up to the "Limit of Liability." (ECF No. 30-9 at 7.) The Limit of Liability
14 identified in the Declarations of the Policy is \$2,000,000 per claim and \$4,000,000 in the
15 aggregate, subject to a \$2,500 deductible. (*Id.* at 5.) Coverage extends to any act, error
16 or omission in the rendering of or failure to render professional services. (*Id.* at 17.)
17 Section I.A. of the Policy provides coverage for "those sums in excess of the deductible .
18 . . that an Insured becomes legally obligated to pay as **Damages** and **Claim Expenses**
19 which the Insured shall become legally obligated to pay because of any **Claim** or
20 **Claims.**" (*Id.* at 7 (emphasis in original).) Section V.B. defines "Claims Expenses" as
21 "fees, costs and expenses resulting from the investigation, adjustment, defense and
22 appeal of a **Claim**, suit or proceeding arising in connection therewith, if incurred by the
23 Underwriters or by the **Insured**..." (*Id.* at 11 (emphasis in original).)

24 Plaintiffs purchased additional endorsements, including a Billing Errors
25 Endorsement and a Claims Expenses Endorsement, to provide supplemental coverage
26 in addition to what was covered under the Policy. (ECF No. 1 at 18.)

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1 **B. The Qui Tam Action**

2 On June 30, 2015, Plaintiffs received notice of a qui tam action filed against them
 3 in the District of Nevada (“Qui Tam Action”).¹ (ECF No. 1 at 2.) The case had been filed
 4 under seal on October 28, 2014. (*Id.* at 7.) The Qui Tam Action is based on allegations
 5 that Plaintiffs provided medically unnecessary therapy services in violation of federal and
 6 state false claims acts. (*Id.* at 2.) Plaintiffs timely notified Underwriters of the lawsuit on
 7 July 14, 2015. (*Id.* at 7.) Underwriters extended \$25,000 of coverage² for any expenses
 8 that Plaintiffs incurred in defending and resolving the Qui Tam Action. (*Id.* at 8.)

9 **C. Coverage Dispute**

10 The Complaint asserts three claims for declaratory relief, seeking a declaration
 11 that Underwriters has a duty to indemnify for Claim Expenses (Count I), a duty to defend
 12 (Count II), and a duty to indemnify for damages (Count III). (ECF No. 1 at 8-11.)
 13 Plaintiffs’ Motion seeks summary judgment on the first two claims. (ECF No. 29.)
 14 Plaintiffs contend that the Policy requires Underwriters to defend them and provide up to
 15 \$2 million for defense expenses. (*See id.* at 6.) Defendants’ Motion seeks summary
 16 judgment, contending that the Qui Tam Action falls outside of the Billing Errors
 17 Endorsement’s coverage period or, if the Qui Tam Action falls within the Endorsement’s
 18 coverage period, that coverage is limited to the sub-limit of \$25,000 identified in the
 19 Billing Errors Endorsement. (ECF No. 26.)

20 **III. LEGAL STANDARD**

21 The purpose of summary judgment is to avoid unnecessary trials when there is no
 22 dispute as to the facts before the court. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
 23 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,

24
 25 ¹The Qui Tam Action is assigned to the undersigned. See case no. 2:14-cv-01786-MMD-GFW.

26 ²Underwriters denied coverage under the professional liability portion of the Policy
 27 but agreed to make \$25,000 available to Plaintiffs for Claims Expenses *and* Loss under
 28 the Billing Errors Endorsement (see ECF No. 1 at 8), subject to a reservation of rights to
 contest the applicability of the Endorsement to the qui tam action (see ECF No. 26 at 11).

1 the discovery and disclosure materials on file, and any affidavits “show there is no
2 genuine issue as to any material fact and that the movant is entitled to judgment as a
3 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is “genuine”
4 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
5 the nonmoving party and a dispute is “material” if it could affect the outcome of the suit
6 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
7 Where reasonable minds could differ on the material facts at issue, however, summary
8 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
9 1995). “The amount of evidence necessary to raise a genuine issue of material fact is
10 enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth at
11 trial.’” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l*
12 *Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary
13 judgment motion, a court views all facts and draws all inferences in the light most
14 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
15 F.2d 1100, 1103 (9th Cir. 1986).

16 The moving party bears the burden of showing that there are no genuine issues
17 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
18 order to carry its burden of production, the moving party must either produce evidence
19 negating an essential element of the nonmoving party’s claim or defense or show that
20 the nonmoving party does not have enough evidence of an essential element to carry its
21 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
22 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,
23 the burden shifts to the party resisting the motion to “set forth specific facts showing that
24 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may
25 not rely on denials in the pleadings but must produce specific evidence, through
26 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
27 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
28 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285

1 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The mere existence of a
 2 scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
 3 477 U.S. at 252.

4 Further, “when parties submit cross-motions for summary judgment, ‘[e]ach
 5 motion must be considered on its own merits.” *Fair Hous. Council of Riverside County,*
 6 *Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W.
 7 Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D.
 8 441, 499 (Feb. 1992) (citations omitted). “In fulfilling its duty to review each cross-motion
 9 separately, the court must review the evidence submitted in support of each cross-
 10 motion.” *Id.*

11 **IV. DISCUSSION**

12 **A. Qui Tam Action Falls Within the Endorsement Period**

13 As a preliminary matter, both parties concede that absent the Billing Errors
 14 Endorsement, coverage for the Qui Tam Action is not available under the professional
 15 liability insurance portion of the Policy. (See ECF No. 29 at 14; see *also* ECF No. 26 at
 16 4.)³ Before addressing the scope of coverage under the Billing Errors Endorsement, the
 17 Court will address the threshold question of whether the Qui Tam Action falls within the
 18 coverage period.

19 Defendant argues that because the Qui Tam Action was filed on October 28,
 20 2014, it falls outside of the Billing Errors Endorsement’s coverage period, which covers
 21 April 15, 2015, to April 16, 2016. (ECF No. 26 at 4.) More specifically, Underwriters point
 22 to section III.2. of the Billing Errors Endorsement, which states that coverage “does not
 23 apply to **Insured Events** which arise from any facts, circumstances, situations, events,
 24 transactions or causes of action which are underlying or alleged in litigation pending on
 25 or prior to the initial effective date.” (ECF No. 26 at 16.) Defendant contends that section
 26 III.2. clearly provides that coverage under the Billing Errors Endorsement does not apply
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28 ³Plaintiffs’ counsel conceded this point during oral argument.

1 to the Qui Tam Action because litigation is pending once it has been filed, regardless of
 2 when it was served on the insured. (*Id.* at 16-17 (relying on *HR Acquisition I Corp. v.*
 3 *Twin City Fire Ins. Co.*, 547 F.3d 1309, 1317-19 (11th Cir. 2008).)

4 The Court disagrees. Underwriters' position is tenuous given the unique
 5 procedural stature of qui tam lawsuits under the False Claims Act ("FCA"), 31 U.S.C. §
 6 3729 *et seq.* Indeed, Underwriters acknowledge that the FCA contemplates that
 7 complaints will remain under seal for at least 60 days after being filed. (See ECF No. 26
 8 at 17.) Yet, Defendant relies on various non-FCA cases in support of its position that if
 9 the Billing Errors Endorsement were to apply to the Qui Tam Action, then the
 10 Endorsement would have clearly stated that it applied to lawsuits that had been filed but
 11 not served. (See *id.* at 16-17.) The language of the Billing Errors Endorsement is clear
 12 that the Endorsement specifically applies to a "Billing Error Proceeding," which
 13 Defendant admits covers qui tam lawsuits. (See ECF No. 26 at 5, 16.) It would be
 14 superfluous for the Endorsement to explicitly state that the date of service is the date of
 15 notice for purposes of coverage as it is commonly understood that a qui tam suit under
 16 the FCA becomes active once the defendant has notice of the lawsuit and that notice
 17 most often occurs at the time of service.⁴

18 The Court therefore finds that the Qui Tam Action was served on Plaintiffs in June
 19 2015 and falls within the endorsement period in the Billing Errors Endorsement.

20 **B. Billing Errors Endorsement is Unambiguously Clear**

21 An insurance policy "must be enforced according to its terms." *Farmers Ins. Exch.*
 22 *v. Neal*, 64 P.3d 472, 473 (Nev. 2003) (the court must "give plain and ordinary meaning
 23 to the terms" of the insurance policy "from the perspective of one not trained in law").⁵

24 ⁴Qui tam suits under the FCA are often under seal for extended periods of time
 25 while the government investigates whether or not to intervene. See § 3730(b)(3). Notice
 26 may occur either when the complaint is unsealed and the defendant receives service of
 the summons, see § 3730(b)(2), or when the government uses its civil investigative
 authority to subpoena defendants, see § 3733.

27 ⁵When a federal district court is sitting in diversity jurisdiction, the court must apply
 28 state law to substantive legal questions. See *Freund v. Nycomed Amersham*, 347 F.3d
 752, 761 (9th Cir. 2003). The parties agree that Nevada law applies.

1 While Plaintiffs are correct that, in the insurance context, the courts broadly interpret
 2 clauses providing coverage to afford the greatest possible coverage, *Fed. Ins. Co. v.*
 3 *Am. Hardware Mut. Ins. Co.*, 184 P.3d 390, 392 (Nev. 2008), unambiguous provisions
 4 may not be rewritten by the court. *Farmers Ins. Exch.*, 64 P.3d at 473. Whether a
 5 contract is ambiguous is a matter of law. *See Anvui, LLC v G.L. Dragon, LLC*, 163 P.3d
 6 405, 407 (Nev. 2007) (“construction of a contractual term is a question of law”)
 7 (quotations omitted). A “Nevada court will not increase an obligation to the insured where
 8 such was intentionally and unambiguously limited by the parties.” *Capitol Indemnity*
 9 *Corp. v. Wright*, 341 F.Supp.2d 1152, 1156 (D. Nev. 2004). Furthermore, an
 10 endorsement to an insurance policy supplements the policy and is not a separate
 11 contract. *See Fed. Ins. Co. v. Amer. Hardware Mut. Ins. Co.*, 184 P.3d 390 (Nev. 2008).

12 Plaintiffs concede that there is no coverage for the Qui Tam Action under the
 13 professional liability portion of the Policy and that coverage is available only because of
 14 the Billing Errors Endorsement. (See ECF No. 29 at 14.) However, Plaintiffs argue that
 15 the Billing Errors Endorsement is ambiguous on its face because it does not expressly
 16 disclaim a duty to defend. (See *id.* at 19.) And, because the Endorsement is silent as to
 17 the duty to defend, Plaintiffs argue that the Billing Errors Endorsement’s \$25,000 sub-
 18 limit applies only to indemnification *for Loss*. (See *id.* at 6-7.) They point to the first
 19 sentence of the second paragraph in the Endorsement to argue that the phrase “Claim
 20 Expenses which the Insured incurs” creates a separate obligation for Claim Expenses
 21 that is not subject to the sub-limit identified in the Endorsement. (See *id.* at 7.) Plaintiffs
 22 then look to the Claims Expenses Endorsement to argue that the \$2 million Limit of
 23 Liability in the Policy applies to Claim Expenses in the Qui Tam Action. (See *id.*)

24 However, the Court must look first to the language of the Billing Errors
 25 Endorsement. The first paragraph in Section I states as follows:

26 In consideration of the premium charged, it is hereby understood and
 27 agreed that a sub-limit of liability of \$25,000 per occurrence and \$25,000 in
 28 the aggregate, and subject to a \$2,500 deductible, applies to any **Billing**
Error Proceeding made against an **Insured** during the **Endorsement**

1 **Period** below and is reported to Underwriters as soon as practicable (but
2 not more than 30 days after expiration of the **Endorsement Period**).

3 (ECF No. 30-9 at 36 (emphasis in original).) The Qui Tam Action is a “Billing Error
4 Proceeding,” an interpretation which is not subject to dispute. Section I unambiguously
5 provides that “a sub-limit of liability of \$25,000 per occurrence and \$25,000 in the
6 aggregate, and subject to a \$2,500 deductible, applies to any **Billing Error**
7 **Proceeding**.” (*Id.*) Clearly, this means what it says: “a sub-limit of liability of \$25,000 . . .
8 applies to any **Billing Error Proceeding**” — i.e., the Qui Tam Action. The Billing Errors
9 Endorsement is unambiguous as to the scope of coverage for the Qui Tam Action.

10 The Court disagrees with Plaintiffs that the Billing Errors Endorsement is silent as
11 to Underwriters’ duty to defend. Section I of the Billing Errors Endorsement goes on to
12 state that “Underwriters shall indemnify the **Insured** for **Loss** in excess of the deductible
13 stated above which the **Insured** is obligated to pay and **Claims Expenses** which the
14 **Insured** incurs.” (*Id.* (emphasis in original).) This Endorsement does not differentiate
15 between Damages and Claim Expenses in defining this sub-limit of liability. Section V.B.
16 of the Policy defines Claim Expenses as “fees, costs and expenses resulting from the
17 investigation, adjustment, *defense*, and appeal of a **Claim**, suit or proceeding arising in
18 connection therewith...” (ECF No. 30-9 at 11) (emphasis added). Thus, “Claim
19 Expenses” as used in the Billing Errors Endorsement incorporates expenses arising from
20 the duty to defend under the Policy.

21 In sum, the Court finds that the Billing Errors Endorsement is unambiguous in
22 providing both that there is a duty to defend and that the sub-limit of liability for that duty
23 is \$25,000. Accordingly, the Court must construe the Billing Errors Endorsement as
24 written and reject Plaintiffs’ proposed construction which involves an interwoven reading
25 of the Policy, the Billing Errors Endorsement and the Claims Expenses Endorsement.

26 **V. CONCLUSION**

27 The Court notes that the parties made several arguments and cited to several
28 cases not discussed above. The Court has reviewed these arguments and cases and

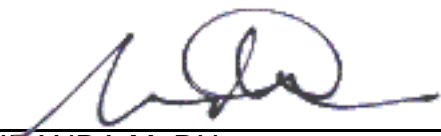
1 determines that they do not warrant discussion because they do not affect the outcome
2 of the parties' Motions.

3 It is therefore ordered that Defendant's Motion for Summary Judgment (ECF No.
4 26) is denied in part and granted in part. It is denied with respect to Defendant's
5 argument that the Qui Tam Action falls outside of the Billing Errors Endorsement's
6 coverage period. It is granted with respect to Defendant's argument that coverage for the
7 Qui Tam Action is available under the Billing Errors Endorsement up to the sub-limit of
8 liability of \$25,000.

9 It is further ordered that Plaintiffs' Motion for Partial Summary Judgment (ECF No.
10 29) is denied.

11 The parties are directed to confer on the effect this Order has on Plaintiffs'
12 pending motion for leave to file the first amended complaint (ECF No. 45). Accordingly,
13 Plaintiffs' motion for leave to file the first amended complaint (ECF No. 45) is denied
14 without prejudice.

15 DATED THIS of 19th day of September 2016.

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18 _____
19 MIRANDA M. DU
20 UNITED STATES DISTRICT JUDGE
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